UNITED NATIONS

GENERAL ASSEMBLY

Distr.
GENERAL

A/CONF.152/C.1/SR.1
9 April 1991

ORIGINAL: ENGLISH

UNITED NATIONS CONFERENCE ON THE LIABILITY OF OPERATORS OF TRANSPORT TERMINALS IN INTERNATIONAL TRADE

FIRST COMMITTEE

SUMMARY RECORD OF THE 1st MEETING

Held at the Austria Center Vienna,
on Wednesday, 3 April 1991, at 10 a.m.

Chairman: Mr. BERAUDO (France)

CONTENTS

Adoption of the agenda

Consideration of articles 1 to 16 and 20 of the draft Convention on the Liability of Operators of Transport Terminals in International Trade

Article 1 (a)

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V.91 37021 0036E

Distr.: 11 April 1991

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The meeting was called to order at 10 a.m.

ADOPTION OF THE AGENDA (item 1 of the provisional agenda) (A/CONF.152/C.1/L.1)

1. The provisional agenda (A/CONF.152/C.1/L.1) was adopted.

CONSIDERATION OF ARTICLES 1 TO 16 AND 20 OF THE DRAFT CONVENTION ON THE LIABILIT OF OPERATORS OF TRANSPORT TERMINALS IN INTERNATIONAL TRADE (agenda item 3) (A/CONF.152/5, 6, 7 and Add.1 and Add.1/Corr.1 and Add.2)

2. The CHAIRMAN drew the Committee's attention to the text contained in docume A/CONF.152/5, which, according to rule 29 of the rules of procedure of the Conference (A/CONF.152/3), was the basic proposal for consideration. The Commit would also be considering alternative proposals or amendments, which would have be submitted in writing. Adoption of such proposals or amendments would be by simple majority, and any States that abstained would be considered as not voting

3. He suggested that the Committee should begin by considering the more substantive provisions of the draft Convention, leaving the less substantive on articles 2, 13, 14 and 20 - till a later stage.

4. It was so agreed.

Article 1 (a) (A/CONF.152/C.1/L.6)

5. Mr. SCHROCK (Germany), introducing his amendment to article 1 (a) (A/CONF.152/C.1/L.6), said that during the preparatory work for the Conference, which had been begun in Rome at the International Institute for the Unification Private Law (UNIDROIT), the scope of the Convention had been broadened considerably. The view expressed in the explanatory report of UNIDROIT had bee that, desirable as it might be to establish a uniform liability for handling intermediaries, it would be unrealistic to seek to do so at that stage. The d text now before the Committee, which had been prepared by the United Nations Commission on International Trade Law (UNCITRAL), did in fact make provision f handling intermediaries. His delegation shared the view expressed in a recent article in the Journal of Maritime Law and Commerce that the definition of "operator" proposed in the draft text was based on the assumption that the ope might provide services in respect of goods in an area in which he had a right access or use, including services which might be performed on board a ship, su loading, unloading, stowage or trimming. While his delegation was in no way opposed to the widening of the scope of the Convention, it believed that the definition in article 1 (a) should make it clear that the handling of goods wa included in the functions of operators of transport terminals: the phrase "to charge" was not sufficient to cover that concept. Some addition was needed i order to provide for situations that differed from the one in which goods were being carried on a means of transport to which no third party had any access. proposal would entail consequential amendments to article 1 (c) and to article but they could be discussed at a later stage.

6. Mr. SWEENEY (United States of America) did not think that the proposed addition would be an improvement, because the phrase "or to handle" was too va In his view, the phrase "to take in charge" was sufficient to cover the many situations that might involve the potential liability of the operator. Refere had been made to the work done by UNIDROIT in 1972, but at that stage efforts been concentrated on the safekeeping aspect of the operator's activities. A

(Mr. Sweeney, United States of America)

subsequent study of terminal operations throughout the world by the UNCITRAL secretariat had shown that in fact safekeeping was no longer the only part of operators' activities, and as a result attention was now being focused on other types of activity. That was why it had been decided, in the analogous provision of the Hamburg Rules, to use the term "in charge" as the best way of defining the individual or enterprise responsible for the goods.

7. Mr. RUSTAND (Sweden) agreed with the representative of Germany that the term "take in charge" was perhaps insufficiently precise; it had given rise to some discussion during the preparatory talks as well as at the previous session of UNCITRAL in 1989. It frequently happened that goods were left on a quay for later collection, without any specific instructions as to their destination: in such a case, were they to be considered as having been "taken in charge" under the terms of the Convention? It was important that the Conference should define the term. However, he did not think the addition of the phrase "or to handle" would be an improvement.

8. Mr. HORNBY (Canada) agreed that the definition contained in article 1 (a) gave rise to some problems, but was not certain that the addition of the phrase "or to handle" would solve them. As he saw it, the definition of "transport-related services" contained in article 1 (d) already made it clear that handling activities were covered by the Convention. It would be best to focus attention on the concept of being "in charge", which had already been used, and defined, in the Hamburg Rules. A further paragraph might be added under article 3 in relation to that concept.

9. Mr. BONELL (Italy) said that he had at first been inclined to favour the German proposal but had now changed his mind in the light of the United States representative's remarks. The fact that the concept of "in charge" was incorporated in the Hamburg Rules was a good reason for maintaining it in the text under consideration. He did not agree, however, with the suggestion of the Canadian and Swedish representatives that the Conference should attempt to define the concept of "taking in charge". Such an exercise would have little chance of success. During the Commission's work on the draft a delegation had proposed the deletion of the words "take in charge goods involved in international carriage in order to", so as to leave it to future users to define the operator more closely. That solution would be preferable to an over-explicit definition.

10. Mr. ROJANAPHRUK (Thailand) agreed with the United States representative that the concept of "taking in charge" covered "handling".

11. Mr. LAVIÑA (Philippines) said that he would have no objection to omitting the words "take in charge goods involved in international carriage in order to" and adding a reference to both "taking in charge" and "handling" in article 1 (d). The text as it stood was, he thought, sufficiently clear, but he would also be prepared to accept the German proposal with a view to facilitating ratification of the draft Convention by as many countries as possible.

12. Mr. SCHROCK (Germany) said that the discussion showed the Conference's interpretation of the concept of "taking in charge" to be somewhat broader than that adopted in other transport conventions. Noting that his delegation's proposal concerning the first sentence of article 1 (a) had received only limited support, he said that he was willing to withdraw it with a view to shortening the debate.

(Mr. Schrock, Germany)

His delegation would, however, wish to have it placed on record that in the understanding of the Conference the concept of "taking in charge" was considerably broader than, for instance, in the General Conditions, 1989, of the Swedish Master Stevedores' Association, which restricted it to placing goods in cargo sheds or premises surrounded by fences.

13. Mr. WALL (United Kingdom) expressed concern at the looseness of the concept of "taking in charge". The discussion had, if anything, left it still looser. In the absence of a clear identification of the person upon whom liability would be placed, the way would be open to overlapping liabilities on the part of several "operators" and to a succession of claims and counter-claims.

14. In his delegation's understanding, article 1 (a), as read together with article 1 (d), did not include the activities of customs and revenue authorities.

15. Mr. SWEENEY (United States of America) agreed both with the German representative's view that the concept of taking in charge was not restricted to storing goods in sheds or behind fences and with the United Kingdom representative's view that article 1 (a) did not cover the activities of customs and revenue authorities. As to the question of precision, he remarked that under existing law the possibility of overlapping liabilities could not be ruled out.

16. Mr. OCHIAI (Japan) gave notice of a proposal by his delegation on the question of stevedores, which would be distributed shortly. He requested the Chairman not to close the debate until the proposal had been discussed.

17. Mr. ZHAO (China) said that his delegation understood the first sentence of article 1 (a) to refer to the entire process which took place between the time when a particular person, who might be a representative of a port authority or an airport authority, took in charge goods involved in international carriage and the time when that person handed those goods over. That broad understanding did not have to be spelt out in the article, as long as it was reflected in the record of the debate.

18. Mr. ROMAN (Belgium) said that his delegation intended to submit a formal proposal in connection with the phrase "in an area under his control", which it considered to be too vague. Unlike the representative of the United States, he did think that the concept of taking in charge should be restricted to the storage of goods in sheds or behind fences; to increase the scope of liability would mean increasing the cost of international transport and would thus be inconsistent with the aim of promoting international trade.

19. Mr. de GOTTRAU (International Road Transport Union), speaking at the invitation of the Chairman and without objection by the Committee, drew attention to the comments submitted by his organization (A/CONF.152/7/Add.1). In the French version of article 1 (a), it would be more appropriate to speak of "... toute personne qui prend sous sa garde ...". Furthermore, it should be noted that the term "person" meant both physical and juridical persons in both public and private law.

20. The CHAIRMAN, summing up the debate on the first sentence of article 1 (a), noted that the amendment proposed by Germany concerning handling operations (A/CONF.152/C.1/L.6) had been withdrawn. Some delegations had expressed concern that the concept of "taking in charge" and the specific operations it involved were not adequately defined. He trusted that careful consideration would be given to the various proposals made and that the matter would be discussed further in

(The Chairman)

connection with other articles in which that concept played a part. With reference to the United Kingdom's objection that the first sentence would leave the situation unclear in practice, he pointed out that the compromise text now before the Conference was the outcome of lengthy and thorough discussions. There was no doubt room for improvement in the wording, a task which might be left to the Drafting Committee. He suggested that the first sentence should remain as it was and wondered whether participants might wish to vote on it.

21. Mr. WALL (United Kingdom) said that his delegation's concern about article 1 (a) was of a substantive nature and could not be dealt with by the Drafting Committee. He thought that a vote on the first part of the article would be premature.

22. Mr. OCHIAI (Japan) pointed out that his delegation's proposal, which concerned the interpretation of article 1 (a), was still pending. He asked whether he might make it orally, before any vote on the article.

23. Mr. BONELL (Italy) agreed with the Chairman's summary of the discussions on the first sentence. The wording was the result of a consensus reached in the Commission after lengthy and very thorough discussions. At so late a stage, he would be most reluctant to see a substantive discussion reopened on the definition of the term "take in charge". The text should be adopted unless there was a clear alternative proposal in writing.

24. The CHAIRMAN, referring to the point raised by the Japanese delegation, said that he preferred to adhere to the procedure of written proposals; the Japanese proposal would accordingly be discussed once it had been circulated in writing.

25. Mr. BERGSTEN (Executive Secretary), explaining voting procedure, said that if the Chairman of one of the Committees saw that there was general agreement on a text discussed by the Committee, there was no reason to put it to the vote. Voting was only necessary if there was obvious disagreement among delegations. By contrast, in the plenary at the end of the Conference, a vote must be taken on each article.

26. With reference to the Japanese proposal, he read out rule 30 of the provisional rules of procedure, which provided that proposals should normally be submitted in writing, but that oral amendments or proposals might be authorized by the President of the Conference. By extension, that included the Chairman of a Committee. Authorization of such a procedure was accordingly left to the discretion of the Chairman.

27. Mr. LAVIÑA (Philippines) endorsed the Executive Secretary's initial comment; the basic principle should be consensus, obviating the need for a vote. Rule 30 should be interpreted broadly, so that all delegations would be able to submit any proposals that might enable the Conference to arrive at a final agreement.

28. Mr. RUSTAND (Sweden) said that, since reference was also made to the concept of "taking in charge" in articles 3 and 5, it would be preferable to defer voting until all the relevant articles had been discussed.

29. Although he agreed with the representative of Italy that the issue had been discussed at length in the Working Group and at the Commission's twenty-second session, that did not preclude discussion of the matter at the Conference. The

(Mr. Rustand, Sweden)

views and proposals put forward would be recorded in the summary records, which would provide a useful frame of reference at a later date.

30. Mr. HORNBY (Canada) said that although written amendments were desirable on complex matters of substance, oral amendments should be acceptable for simpler matters such as the deletion of a word or phrase.

The meeting was suspended at 11.15 a.m. and resumed at 11.55 a.m.

31. Mr. ROMAN (Belgium) expressed surprise at the apparent suggestion that there was no possibility of reopening the debate on a particular issue; if that were the case, there would be no need to work on the draft at all and the Conference could merely put the various articles to the vote.

32. The CHAIRMAN said that the Conference should exercise restraint in considering whether to reopen a discussion.

33. Mr. BONELL (Italy) considered that amendments should in principle be submitted in writing but that, where appropriate, exceptions should be allowed at the Chairman's discretion. He did not recall there having been any suggestion that there should be no possibility of further discussion. There was, however, no time for lengthy debate. The substance of the text now before the Conference, on a highly controversial issue, had been thoroughly discussed before it was drafted and a reopening of the substantive debate at so late a stage would be inappropriate.

34. Mr. WALL (United Kingdom) trusted that it would be possible to proceed without a vote. The discussion on article 1 (a) had been very useful, and subsequent discussions might reveal a need to reopen the debate on certain points and improve the wording of the text. His delegation felt that certain definitions in article 1 (a) needed to be reconsidered before a vote was taken; in general, it hoped that the Committee would not be too eager to take votes too often.

35. The CHAIRMAN said that there would be no vote on the first sentence of article 1 (a) for the time being. He invited the Conference to proceed with its consideration of the second sentence of that article. The proposal announced by Japan concerning conflicts between the Convention and applicable rules of law governing carriage had not yet been circulated as such, but would be found in its comments in document A/CONF.152/7.

36. Mr. OCHIAI (Japan) said it was perfectly clear that the preliminary draft Convention had applied to stevedores even if they were covered by a clause in a bill of lading that extended to them the benefits available to carriers under applicable rules of law governing carriage. The draft Convention under consideration was not quite clear on that point. If it excluded such stevedores, it would not apply to about 90 per cent of the functions it was intended to cover. If it was to be of any use, it would have to include them.

37. Mr. HORNBY (Canada) said that his delegation shared the concern expressed by the representative of Japan about the second sentence of article 1 (a), which seemed to suggest that it would be possible for stevedores to place themselves outside the ambit of the Convention by invoking clauses contained in a carrier's contract. The purpose of the draft Convention was to ensure greater uniformity in the law applicable to limits for stevedores and for terminal operators in general.

(Mr. Hornby, Canada)

If stevedores were allowed to place themselves outside the provisions of the Convention and to have the same limits as carriers, its whole purpose would be defeated.

38. Ms. VAN DER HORST (Netherlands) drew attention to the sentence which her Government had proposed in place of the second sentence of article 1 (a) (A/CONF.152/7/Add.1, p. 6). It was concerned about the meaning of the existing sentence, in particular the word "responsible". The Netherlands had ratified the Hague-Visby Rules, under which a carrier was not responsible for goods before they were loaded on board and after they had been unloaded. The existing sentence suggested that the carrier could be regarded as liable under the Convention at such times, and the word "responsible" had therefore been deleted in the sentence proposed by her Government.

39. Mr. SWEENEY (United States of America) said that his delegation was in favour of keeping the existing wording. During the drafting of the text in the UNCITRAL Working Group, one of the major difficulties had been the reference to the word "stevedore", the meaning of which was not the same in all transport systems. Since the purpose of the draft Convention was to fill existing gaps, the need to have a broad conception of the word "stevedore" had been recognized.

40. Stevedores were not automatically covered by a bill of lading. In fact, that was a key issue in bargaining between stevedores and carriers, the purpose of which was to prevent unnecessary waste of resources and to eliminate dual or even triple insurance coverage. In the United States, stevedores were usually interested only in limiting their monetary liability.

41. Mr. LAVIÑA (Philippines) thought that the second sentence of article 1 (a) was quite vague. He agreed that the term "stevedore" had different meanings in different countries.

42. His delegation wished to make it clear that, when an operator had a dual capacity arising from his responsibility for the goods under the applicable rules, he would not be considered an operator in all circumstances. Secondly, the expression "applicable rules of law governing carriage" referred to both domestic law and treaty law.

43. Mr. BONELL (Italy) agreed that the rules in question should have the widest possible sphere of application, which meant that stevedores should in principle be included. Was he right in thinking that the United States representative's basic concern was that stevedores should not be placed in a worse position than carriers?

44. Mr. SWEENEY (United States of America) said that in the United States a complex situation involving bargaining between stevedores and carriers had led to considerable litigation, which sometimes went in favour of stevedores and sometimes against them. For example, the courts had struck down a number of broad provisions in maritime bills of lading that accorded the protections enjoyed by the carrier to all agents or independent contractors who had anything to do with the transport of goods. It should be noted that stevedores had to bargain for protection. Many carriers were unwilling to extend the terms of their bills of lading automatically to stevedores. When they did so, they charged extra. His delegation had therefore expressed the view that stevedores should be treated in the same way as carriers, in other words that they should not be placed in a worse position than carriers.

45. Mr. BONELL (Italy) thought that until a decision was taken on the limits of liability, it would be necessary to keep the existing text, possibly with the Japanese amendment.

46. Mr. WALL (United Kingdom) said that in his delegation's opinion, carriers must be excluded from the coverage of the draft Convention. That was the primary intent of the second sentence of article 1 (a). If the existing text of the sentence was kept, it would be in the stevedore's interest to seek whatever protection he could obtain from the carrier under the bill of lading or other transport document. His delegation agreed that if it was desired that the stevedore should not be placed in a worse position than the carrier, that could only be decided upon once a decision had been taken on the limitation amounts to be included in the draft Convention. At the present stage, his delegation believed that the draft Convention should specifically include stevedores.

47. Mr. RUSTAND (Sweden) shared the concern expressed by the representative of Canada. It would be unfortunate if the draft Convention created a new gap. His delegation's understanding was that if an operator was liable for goods under another applicable convention, then he would not be liable under the draft Convention. It had never been his delegation's understanding that the stevedore could be exempted from liability under the Convention by clauses contained in a bill of lading. He doubted whether the Netherlands proposal would ensure that stevedores could not escape any limitation and thought that it would have the opposite effect.

The meeting rose at 12.30 p.m.